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UNITED NATIONS

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General Assembly

Distr.
LIMITED

A/CN.4/L.496/Add.1
13 July 1994

ENGLISH
Original: FRENCH

INTERNATIONAL LAW COMMISSION
Forty-sixth session
Geneva, 2 May-22 July 1994

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION

CHAPTER II

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Addendum

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B. Consideration of the topic at the present session (continued)

II. Draft Code of Crimes against the Peace and Security of Mankind

1. At the present session, the Commission had before it the twelfth report of the Special Rapporteur on the topic (A/CN.4/460 and Corr.1). It also had before it, in document A/CN.4/448 and Add.1, comments and observations formulated by member States, in response to the request made by the Commission at its forty-third session, on the draft Code of Crimes against the Peace and Security of Mankind, as adopted on first reading at that session.

2. The Special Rapporteur noted, both in the introduction to the twelfth report and in submitting that report to the Commission, that it was intended for the second reading of the draft Code and focused only on the general part of the draft dealing with the definition of crimes against the peace and security of mankind, characterization and general principles.

3. He stated that part II of the draft Code, concerning the crimes themselves, would be dealt with in a new report at the Commission's next session and that he intended to limit the list of such crimes to offences whose characterization as crimes against the peace and security of mankind was hard to challenge.

4. In his twelfth report, the Special Rapporteur reproduced, article by article, the draft adopted on first reading, each article being followed by comments from Governments and then by the Special Rapporteur's opinion and conclusions and recommendations on each draft article.

5. The Commission considered the Special Rapporteur's twelfth report at its 2344th to 2347th and 2349th to 2350th meetings held from 27 May to 7 June 1994.

6. Several members made general comments on the Special Rapporteur's twelfth report and on the draft articles themselves.

7. Some members expressed reservations about the current relevance of the title of the draft Code. It was pointed out that it might not be an exact reflection of the content that was to be given to the future instrument. It was appropriate for certain crimes, such as aggression, but was much more debatable for others, such as genocide or crimes against humanity which did not come under the peace and security of mankind unless the concept was given a very broad meaning. With regard to the suggestion by some members that the draft Code should be called the

"code of international crimes", other members were of the opinion that such a title might create confusion with the crimes referred to in article 19 of Part One of the draft articles on State responsibility. Even the term "code" was questioned by some members. They considered that it should be followed by a generic expression to which, precisely, the Code was supposed to give content, since there could not be a code of some crimes only. However, other members pointed out that the word "code" was used in many areas, including technical fields, whose purpose was not necessarily to codify a topic as a whole.

8. It was generally agreed that the best course would be to wait and see what crimes would be included in the draft Code before deciding whether or not the title should be kept. It was nevertheless pointed out that the Commission itself could not change the title, since it was used in resolution 177 (II), in which the General Assembly had given the Commission its mandate to prepare the draft Code.

9. Several members welcomed the Special Rapporteur's intention to limit the number of crimes solely to those offences whose character as a crime against the peace and security of mankind it was difficult to challenge. It was pointed out in that regard that States were generally reluctant to waive or surrender their criminal jurisdiction and it was only in connection with the most serious international crimes that States might be willing to accept the establishment of an international criminal court. It was also pointed out that that desirable limitation of the content of the draft Code would have a direct impact on the general part of the draft, inasmuch as the wording of certain provisions must necessarily be very different depending on whether the Code covered virtually all violations of international law or whether it would be limited to "crimes of crimes", those that were the most serious and constituted either a breach of the peace or a violation of the very notion of humanity.

10. Still another opinion with regard to the scope of the list of crimes was that there were two obstacles to a substantial reduction in the number of crimes to be included. The first was the draft statute for an international criminal court, which might force the Special Rapporteur not to limit, but to lengthen the list, although that would not change the constraints inherent in the definition of crimes. The second obstacle derived from the nature of the victim, namely,

mankind as a whole, which might also have a legitimate interest in having the Special Rapporteur lengthen the list. Mankind was referred to in nearly all international criminal law texts. According to that opinion, some consideration should perhaps therefore be given to the impact on any list of possible crimes of the inclusion of mankind; in other words, it might be asked whether a list of crimes, even a limited one, should be closed off to any change.

11. As to the scope of the draft Code ratione personae, the comment was made that the Code was intended to focus exclusively on crimes committed by individuals and thus did not provide for the direct or implied criminality of States. The emphasis in the draft Code on the role of State agents was welcomed because they, more than anyone else, were likely to be the perpetrators of crimes against the peace and security of mankind. However, it was noted that, at the beginning of the discussion on the Code, the Commission had planned to cover not only the criminal responsibility of individuals, but also the criminal responsibility of States; it had subsequently decided to focus solely on the former, leaving aside, but not completely excluding, the question of the criminal responsibility of States. It was noted in that regard that the problem of the link between the two categories of responsibility and, in particular, of the relationship between the draft Code and article 19 of the draft on State responsibility was bound to arise again and the Commission would therefore have to give it some thought.

12. Some members pointed out that the question of penalties to be applied to the perpetrators of crimes covered in the draft Code had not yet been settled and that the Commission would have to take a decision on it. It was noted that the question of the interrelationship between the draft Code, the statute of the international criminal court and national courts should be clarified from the outset, since it would have important repercussions on the question of applicable penalties. If the Code was to be implemented by the proposed international criminal court, it would have to state specific penalties for each crime according to the principle nulla poena sine lege. On the other hand, if the Code was to be implemented by national courts of States or by both national courts and the international criminal court, the determination of penalties could be left to

be decided by national law in the former case or to be dealt with by reference to national law in the latter.

13. With regard to the draft Code as it related to internal law, the opinion was expressed that it would be preferable if the convention through which the Code entered into force imposed the obligation on States parties to incorporate the Code in their respective legal systems. States, it was pointed out, should be unambiguously bound to graft the entire contents of the Code into their respective systems of criminal law and criminal procedure. In particular, it should be made clear in the convention that any State party whose legal system was not brought into line as soon as the convention entered into force would be in breach of the convention vis-à-vis all other States parties. In that way, the primacy of the Code over internal law would be automatically ensured in respect of all States parties.

14. Some members stressed that the treaty by which States would become parties to the Code should provide for an appropriate procedure for the peaceful settlement of disputes. It was suggested that the Code should contain a suitable compromisory clause specifying the settlement procedure or procedures to which States in dispute should have recourse in the event of failure to settle a dispute by negotiation.

15. A large number of members of the Commission emphasized the need to ensure the necessary coordination between the provisions of the draft Code and those of the draft statute for an international criminal court. Although the two exercises should not be rigidly linked and the adoption of one of the instruments should not be contingent on the adoption of the other, there were inevitably provisions and problems common to the two drafts, particularly the general part of the draft Code. The necessary measures therefore had to be adopted to ensure that there was no contradiction between the articles common to the two drafts.

16. Some members, while agreeing that there was a need for coordination between the articles common to the draft Code and the draft statute, nevertheless stressed that the fact that there were articles common to both instruments simply meant that there were minimal standards to be maintained in both cases, but not that there were necessarily other kinds of link. The two undertakings were in

fact distinct in that the draft statute created a new mechanism to assist in the implementation of existing provisions, whereas the Code created new provisions.

17. A discussion then took place in the Commission on the various articles of the draft Code which the Special Rapporteur had dealt with in his twelfth report.

18. With regard to draft article 1 on the definition of crimes against the peace and security of mankind, the text provisionally adopted by the Commission on first reading read: "The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind".

19. In his twelfth report, the Special Rapporteur indicated that the observations of Governments on that draft article had focused essentially on whether a definition by enumeration would suffice or whether there should be a general definition instead. In the Special Rapporteur's opinion, those observations showed that there was no agreement on any one method. He also noted that many penal codes contained no general definition of the concept of crime. They merely enumerated the acts regarded as crimes, on the basis of the criterion of seriousness. In the light of the compromise formula proposed by one Government, however, he was prepared to propose a text that would contain a general or conceptual definition followed by a definition by enumeration that would not be limitative, but simply indicative. 1/

20. In the light of the replies of Governments, the Special Rapporteur had no objection to the deletion of the words "under international law" in square brackets in draft article 1 as provisionally adopted on first reading. The question whether or not those words should be retained in the text was, in his

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1/ The new text of draft article 1 proposed by the Special Rapporteur reads as follows:

"Article 1. Definition

1. For the purposes of this Code, a crime against the peace and security of mankind is any act or omission committed by an individual which is in itself a serious and immediate threat to the peace and security of mankind and results in the violation thereof.

2. In particular, the crimes defined in this Code constitute crimes against the peace and/or security of mankind."

opinion, a purely theoretical one. Once the Code became an international instrument, the crimes defined in it would come under international criminal law derived from treaties.

21. Several members of the Commission were of the opinion that, in order to serve some purpose, the definition of crimes against the peace and security of mankind in article 1 should contain a conceptual element characterizing the category of crimes in question. It was pointed out that such a definition would provide criteria for the establishment of the list of crimes. It was also pointed out that a conceptual definition would be even more necessary if the list was not exhaustive and was to be brought up to date from time to time. If the Commission did not lay down a general definition and gave only a list, the categories of crimes that could be included in the Code would be closed, something which would be most unfortunate. Thus, in the opinion of those members, a conceptual and general definition was virtually indispensable. In that connection, some members considered that the concept of seriousness was indissociable from a conceptual definition of the crimes to be covered.

22. Other members expressed reservations about a general or conceptual definition of crimes. It was asked whether it would really be possible to find a common denominator for all of the crimes. Moreover, such a definition might create the risk that penalties would be applied to acts or omissions having no exact definition, and that would be at variance with the precision and rigour of criminal law and with the principle of nullum crimen sine lege. It was also pointed out that any general definition was bound to create difficulties with States in respect, for example, of aggression and terrorism. The various treaties that existed on extradition and conventions to combat terrorism always clearly stated which offences were punishable. In the view of those members, the Commission should not strive for a general wording to cover all of the crimes in the draft Code.

23. Some members found that the compromise proposal submitted by the Special Rapporteur in his twelfth report was interesting and worth taking into account.

24. Several members were of the opinion that there was no need for the words "under international law" contained in the draft article provisionally adopted on

first reading. Some of them thought it was not certain that all crimes enumerated in the draft Code were really crimes under international law.

25. In the view of other members, the words "under international law" might lead to interpretations introducing the idea of the criminal responsibility of States, which was outside the scope of the Code.

26. Still others agreed with the Special Rapporteur that the question was a purely theoretical one, since those words did not introduce anything new and, once the Code was adopted, it would become a convention and the crimes defined in it would accordingly become international crimes.

27. With regard to draft article 2 on "characterization", 2/ the Special Rapporteur noted in his twelfth report that it established the autonomy of international criminal law with regard to internal law. He pointed out that the fact that a crime was characterized as murder by the internal law of a State would not preclude the characterization of the same act as genocide on the basis of the Code, if the constituent elements of genocide were present.

28. However, since several Governments had stated in their written replies that the second sentence of draft article 2 was redundant and suggested that it should be deleted, the Special Rapporteur was prepared to accept its deletion.

29. Several members of the Commission were in favour of the draft article and the principle of the autonomy of international criminal law with regard to internal law, but supported the deletion of the second sentence of the article, which they did not regard as really essential.

30. Other members were, however, of the opinion that the second sentence of the draft article should be retained. It was emphasized that the first and second sentences of the draft article dealt with two different concepts - the

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2/ Draft article 2 adopted by the Commission on first reading reads as follows:

"Article 2. Characterization

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization."

characterization of the crime, on the one hand, and the fact that it was or was not punishable, on the other.

31. Some members, while in favour of retaining draft article 2, considered that the Commission should avoid suggesting that there was a conflict between international law and internal law. The crimes that the Commission had chosen were punishable in the internal law of all civilized States and, as such, were not completely independent of internal law. The point was that the characterization provided for in the draft Code was independent of the characterization in the internal law of any given State. In that connection, it was suggested that the wording of the first sentence of article 2 should be amended to reflect the link that existed between the draft Code and the penal codes of all civilized States.

32. With regard to draft article 3, entitled "Responsibility and punishment", the text adopted by the Commission on first reading consisted of three paragraphs: the first two were retained by the Special Rapporteur in his new proposal and are reproduced below in footnote 3; according to paragraph 3, "An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind [as set out in arts. ...] is responsible therefor and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention".

33. In his twelfth report, the Special Rapporteur indicated that draft article 3 set forth the principle of international criminal responsibility of the individual, a principle now accepted in international criminal law since the Judgment of the Nürnberg Tribunal. As to paragraph 3 of the article, criticism with which he agreed had emphasized that attempt was not applicable to all crimes against the peace and security of mankind, such as threat of aggression. In some cases, attempt was expressly covered by existing conventions, e.g. the Convention on the Prevention and Punishment of the Crime of Genocide. In the Special Rapporteur's opinion, instead of determining on a case-by-case basis the crimes to which the concept of attempt might apply, the draft Code should leave it to the competent courts to decide for themselves whether that characterization was applicable to the specific content of cases before them. He was therefore

proposing a rewording of paragraph 3 under which an act would be punishable only if the court considered that it actually constituted an attempt. 3/

34. It was pointed out that, in the French text, the title of article 3 did not correspond to the wording of paragraph 1: it used the word "sanction", whereas paragraph 1 spoke of "châtiment", which, in the opinion of some members, had a moral rather than legal connotation.

35. The content of paragraph 1 was generally well received.

36. As far as paragraph 2 was concerned, some members found its wording too vague and likely enormously to expand the category of persons who could be punished under the Code. For the crime of aggression, for example, every soldier would be punishable and that would not square with the principles of the law of war. In part II of the draft Code, great care had been taken in determining which persons were responsible for crimes and, in the opinion of those members, paragraph 2 should be recast to take into account each of the crimes enumerated in part II.

37. Paragraph 3, as amended by the Special Rapporteur, was found acceptable by some members.

38. Other members had reservations about that paragraph and preferred the original version. It was pointed out that, while it was true that there could be no attempt to commit a threat of aggression, that was the only example the Special Rapporteur had given and that should therefore lead to a specific

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3/ Draft article 3, as amended by the Special Rapporteur, reads as follows:

"Article 3. Responsibility and punishment

1. An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.

2. An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment.

3. An individual who commits an act constituting an attempt to commit one of the acts defined in this Code is responsible therefor and is liable to punishment."

determination of the relevant crimes to which the concept of attempt did not apply. It was also stressed that the suggestion that the competent courts should have the right to decide for themselves whether the characterization of attempt was applicable to the specific content of cases before them might seem attractive, but, unlike criminal courts, which, in most legal systems, could interpret concepts in a broad sense, an international criminal court would have well-defined powers and it was not certain that States would want to give it a great deal of room to manoeuvre. With regard to the replacement of the words "crime against the peace and security of mankind" by the words "one of the acts defined in this Code", it was asked how that change might allay the concerns of those who deemed paragraph 3 very broad in scope.

39. Another suggestion on paragraph 3 was that it should be deleted and that the concept of attempt should be incorporated, without a definition, in paragraph 1 of the draft article, which might speak of "an individual who commits or attempts to commit ...". The components of the definition of attempt might be incorporated in the commentary to the draft article.

40. Some members considered that article 3, like article 2, should clearly indicate that the fact of not preventing the commission of a crime could also be a crime.

41. In the opinion of some members, draft article 3 should be brought more closely into line with article 7 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of Former Yugoslavia.

42. The Special Rapporteur noted in his twelfth report that draft article 4 on "motives", as provisionally adopted by the Commission on first reading, 4/ had prompted many reservations either because it was considered to interfere with the rights of the defence or because it was considered that it would be better placed

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4/ The text of draft article 4 provisionally adopted by the Commission on first reading reads as follows:

"Article 4. Motives

Responsibility for a crime against the peace and security of mankind is not affected by any motives invoked by the accused which are not covered by the definition of the crime."

in the draft article on extenuating circumstances. The Special Rapporteur advised the deletion of the draft article.

43. Many members of the Commission supported the Special Rapporteur's proposal that draft article 4 should be deleted. It was pointed out that a distinction was usually drawn between motive and intent, or mens rea, with motive not forming part of the elements making up the offence. Thus, the characterization of motive was not very useful, for it came into play only in determining the degree of responsibility. Political motives usually worked to reduce the penalty normally assigned, for example, by preventing the death penalty from being imposed in criminal justice systems where it still existed. Those members were therefore of the opinion that article 4 should be deleted and its contents incorporated in the draft article on extenuating circumstances.

44. However, some other members considered that article 4 belonged in the draft Code and did not believe that motives could be incorporated in extenuating circumstances or in the category of exceptions. Some of those members emphasized in particular that persons who committed crimes against the peace and security of mankind should not be able to argue that they had done so for political reasons and therefore should not be punished, or that their crime was political in nature. They wanted that idea to be clearly brought out in the draft. It must be made clear that the motive, especially in connection with a political offence, would be disregarded when responsibility and punishment were determined.

45. The Special Rapporteur indicated in his twelfth report that he had found no unfavourable comments by Governments on draft article 5 entitled "Responsibility of States". Governments all agreed that a State should be held internationally liable for damage caused by its agents as a result of a criminal act committed by them. The Special Rapporteur explained that a single criminal act often had dual consequences: criminal consequences, namely, the penalty imposed on the perpetrator, and civil consequences, namely, the obligation to compensate for the damage. Very often, the perpetrators of the crimes under consideration were agents of a State acting in an official capacity. In such cases, State responsibility in the classical sense of the term had to be determined, especially as the scope and extent of the damage far exceeded the resources for reparation available to the agents of the State who committed the crimes. The

Special Rapporteur therefore proposed that the draft article should be retained. 5/

46. Several members of the Commission supported draft article 5 as adopted on first reading and the proposal by the Special Rapporteur that it should be retained. In that connection, it was pointed out that the article embodied the very sensible and fundamental principle that the international criminal responsibility of the individual should not ipso facto exclude the international responsibility of the State for a crime against the peace and security of mankind. It was also recalled that that principle had been enshrined in treaties, including article IX of the 1948 Convention on Genocide.

47. Some members supported the underlying principle of draft article 5, but found that its wording was not very felicitous and could be improved. It was pointed out that the draft article had to be read in conjunction with some articles of the draft on State responsibility, namely, articles 5 and 8 of Part One and article 10, paragraph 2 (b), of Part Two. However, in the opinion of some members, the present wording of the draft article seemed to rule out the existence of any link between the criminal responsibility of an individual and the responsibility of the State. Although a distinction had to be made between those two concepts, it must not be forgotten that there was sometimes an overlap between them. For example, according to article 10, paragraph 2 of the draft on State responsibility, one of the elements of satisfaction was the criminal prosecution of the individuals whose conduct had been at the origin of the internationally wrongful act of the State. However, satisfaction did not relieve the State of other possible consequences of the crime, such as reparation. It was therefore suggested that the draft article should clearly state that "The prosecution of an individual for a crime against the peace and security of

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5/ Draft article 5 provisionally adopted on first reading and retained by the Special Rapporteur in his twelfth report reads as follows:

"Article 5. Responsibility of States

Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it."

mankind shall be without prejudice to any responsibility of the State under international law".

48. Furthermore, while some members considered that the wording of the article might be improved to avoid any confusion with the concept of criminal responsibility of the State, other members found that the present wording offered the advantage of not necessarily ruling out that concept in case it should be recognized in future.

49. With regard to draft article 6 on the "obligation to try or extradite", provisionally adopted by the Commission on first reading, 6/ the Special Rapporteur indicated in his twelfth report that, in their written replies, governments did not challenge the principle set forth in article 6, but were concerned at how it might be applied. A first comment related to the guarantees to be provided to the accused whose extradition was being requested. The Special Rapporteur stressed that the point had been dealt with carefully in the Working Group's report on the establishment of an international criminal jurisdiction annexed to the report of the Commission on its previous session and that he was of the opinion that that formula might be used in the draft Code. A second comment by Governments had to do with the scope of the rule set forth in draft article 6. According to some States, the rule should apply only to States parties to the Code. The Special Rapporteur thought that that view deserved favourable consideration. He indicated that a third point made by Governments concerned the order of priority to be assigned to requests for extradition when

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6/ Draft article 6 provisionally adopted by the Commission on first reading reads as follows:

"Article 6. Obligation to try or extradite

1. A State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.

2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.

3. The provisions of paragraphs 1 and 2 do not prejudge the establishment and the jurisdiction of an international criminal court."

there were several of them. In the Special Rapporteur's view, although the principle of territoriality of criminal law was unanimously accepted and, accordingly, the request of the State where the crime was committed must have priority, nevertheless the rule should not be considered absolute. As pointed out by some Governments, the rule gave rise to reservations when the State where the crime was committed bore some responsibility in its commission. The Special Rapporteur thought that the rule might also prompt reservations if an international criminal court existed. He also asked whether a request by a State in whose territory the crime was committed could have priority over a request by an international criminal jurisdiction. In his opinion, the answer must be in the negative.

50. Some members approved without reservation the present wording of paragraph 1 of the draft article. Some other members, while basically endorsing the principle embodied in paragraph 1, wondered whether it had been drafted in the best possible way. It was pointed out in that connection that the wording of the various treaties and conventions on universal jurisdiction in force was quite varied and that it would be necessary to make a systematic study to see what the common denominators were. The present terms of paragraph 1 seemed inconsistent with the wording found in model texts. For example, article 7 of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents stipulated that, if the State party did not extradite the alleged offender, it must submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Article 6 of the draft Code, on the other hand, merely said that the State must either try or extradite the alleged perpetrator of a crime. In the view of these members, the formulation of article 6 should therefore be brought into line with the wording in other texts.

51. With regard to the scope ratione personae of the principle set forth in paragraph 1, it was open to question whether that principle must be applied only to States parties to the Code or to all States. It was observed that, if the Code became a convention, the theoretical reply to the question would need to be assessed in the light of the relevant provisions of the 1969 Convention on the Law of Treaties and, in particular, of its articles 34, 35, 38 and 43. It would

thus be necessary to establish to what extent the principle aut dedere aut judicare had gained acceptance as a customary rule binding on States not parties to the Code. From a practical standpoint, not to concede that the scope of that principle was erga omnes would amount to a weakening of the system of the Code.

52. With regard to paragraph 2 of the draft article, several members, while recognizing the importance which normally attached to the criterion of territoriality in matters of extradition, stated reservations about the priority which paragraph 2 seemed to accord in the extradition process to the State in whose territory the crime was committed. It was argued in that connection that such priority might result in the extradition of an alleged criminal to the State whose responsibility was also established by the act of the individual and that that, in turn, might lead to accommodating judgements. In other cases, such extradition might lead to judgements prompted more by revenge than by a concern for justice.

53. Some members nevertheless observed that the rule set forth in paragraph 2 was not absolute and that the wording provided merely that "special consideration shall be given" to a request from the State in whose territory the crime was committed. It was pointed out that that flexibility could be enhanced by replacing the words "shall be given" by "may be given".

54. It was stated that paragraph 3 and some aspects of the article as a whole should be amended in the future in the light of the adoption of the statute for an international criminal court. It was observed that the article should include a provision similar to the one contained in article 63 of the draft statute for an international criminal court annexed to the report of the Commission on its previous session (A/48/10) concerning the surrender of an accused person to the court. It was suggested that the draft article should state clearly that the international court would have priority in the event of several requests for extradition or surrender of an accused person.

55. With regard to the guarantees to be provided to an accused person whose extradition was requested, some members suggested using in the draft Code the wording adopted in the preliminary draft statute for an international criminal court annexed to the report of the Commission on its previous session (A/48/10).

56. With regard to draft article 7 on the non-applicability of statutory limitations, 7/ the Special Rapporteur pointed out in his twelfth report that the written comments received from Governments demonstrated that the rule of the non-applicability of statutory limitations was not universally accepted by States. That rule had emerged only after the Second World War, on the initiative of the United Nations, in the form of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968 and General Assembly resolution 3074 (XXVIII) of 3 December 1973 concerning the principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity; paragraph 1 of the resolution stated that such crimes must be prosecuted "whenever committed". The Special Rapporteur also emphasized that those instruments were, however, limited in scope, since they covered only war crimes and crimes against humanity. It seemed to him difficult to extend the rule to all other crimes covered by the Code. In the circumstances, he considered that the draft article concerning the non-applicability of statutory limitations to the crimes covered by the Code should be deleted. Only general rules applicable to all crimes against the peace and security of mankind should be included in the Code and the rule set forth in draft article 7 did not appear to be applicable to all the crimes listed in the Code, at least according to the terms of existing conventions.

57. Some members of the Commission supported the Special Rapporteur's solution of deleting draft article 7. It was pointed out in that connection that the rule of the non-applicability of statutory limitations could not be applied to all the crimes covered in the Code and that article 7 dealt with a question that basically had to be decided by Governments in view of the various elements that they had to take into account when making general policy decisions. The fact

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7/ Draft article 7 provisionally adopted by the Commission on first reading reads as follows:

"Article 7: Non-applicability of statutory limitations

No statutory limitation shall apply to crimes against the peace and security of mankind."

that fewer than 30 States had ratified the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity clearly showed that Governments were hardly inclined to accept provisions regulating in advance and in a standard manner issues which were basically part of their general policy.

58. It was also pointed out that an absolute rule of the non-applicability of statutory limitations could, in certain cases, hamper reconciliation between two communities that might have been at odds in the past or even hamper amnesty granted by a Government with the democratically expressed consent of a national community with a view to the definitive restoration of internal peace.

59. It had been asked whether there was any point in bringing to justice the perpetrator of a crime against the peace and security of mankind 30 or 40 years after the crime had been committed. All kinds of difficulties could arise after such an interval. A compromise solution might be to provide that time would cease to run for so long as there were factual grounds for not initiating criminal proceedings, for instance, for the whole period during which criminals who could be prosecuted under the provisions of the Code were in power in a country.

60. Some members thought that, instead of the non-applicability of statutory limitations, provision should be made for a period of prescription which was sufficiently long in relation to the gravity of the crimes included in the draft Code.

61. However, other members thought that the rule of the non-applicability of statutory limitations belonged in the draft Code since the moral and legal philosophy of the instrument was based on the fundamental concept of most serious crimes and on the need to draw the strictest conclusions, both legal and practical, from that concept. That was why some of these members believed that the question of the scope of the principle of the non-applicability of statutory limitations depended to a large extent on the content of the draft Code, which ought to treat as crimes the truly most serious crimes or "crimes of crimes" to which the principle of the non-applicability of statutory limitations might reasonably be applied. Otherwise, the scope of draft article 7 would have to be reduced and apply only, for instance, to crimes against humanity and war crimes.

62. Lastly, some members who favoured the principle of the non-applicability of statutory limitations to crimes against the peace and security of mankind thought that the effects of that rule might be eased, for humanitarian reasons or reasons of national reconciliation, by providing for the possibility that a convicted person might be eligible for pardon, parole or commutation of sentence.

63. With regard to article 8 (Judicial guarantees), article 9 (Non bis in idem) and article 10 (Non-retroactivity) as a whole, several members emphasized their importance in a highly civilized approach to the policy for dealing with crime and the necessary relations which had to be established between those provisions of the draft Code and the ones dealing with the same matters in the draft statute for an international criminal court.

64. With regard to article 8 (Judicial guarantees), the Special Rapporteur indicated in his twelfth report that the draft article had garnered a broad consensus, especially since it merely conformed to the provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. He therefore proposed to retain it. 8/

8/ Draft article 8 provisionally adopted by the Commission on the first reading and retained by the Special Rapporteur in his twelfth report reads as follows:

"Article 8: Judicial guarantees

An individual charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to both the law and the facts. In particular:

1. He shall be presumed innocent until proven guilty.

2. He has the right:

(a) in the determination of any charge against him, to have a fair and public hearing before a competent, independent and impartial tribunal duly established by law or by treaty;

(b) to be informed promptly and in detail, in a language that he understands, of the nature and cause of the charge against him;

(c) to have sufficient time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) to be tried without undue delay;

65. Several members of the Commission expressed their agreement with the existing wording of article 8 which, it was said, set forth the minimum guarantees to which any accused person must be entitled, and which constituted one of the fundamental rules of international law and of human rights instruments.

66. The remark was nevertheless made that the article should be harmonized with article 44 of the draft statute for an international criminal court annexed by the Commission to the report on its previous session, 9/ as both dealt with the same subject-matter.

67. It was also remarked that a balance should be maintained between the judicial guarantees offered to the accused and the security of the international community.

68. With regard to article 9 (non bis in idem), the draft article provisionally adopted on first reading provided that no one should be tried or punished for a crime under the Code for which he had already been finally convicted or acquitted by an international criminal court. Paragraph 2 of the draft article established the same principle with regard to a final conviction or acquittal by a national court, but subject to numerous exceptions set forth in paragraphs 3 and 4 of the article, namely: (a) if the act which had been the subject of trial and judgement as an ordinary crime corresponded to one of the crimes characterized in the Code; (b) if the act which had been the subject of the national judgement had

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(e) to be present at his trial and to defend himself in person or through legal assistance of his own choosing; to be informed if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it;

(f) to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) not to be compelled to testify against himself or to confess guilt."

9/ Official Records of the General Assembly, Forty-eighth session, Supplement No. 10 (A/48/10).

taken place in the territory of the State whose court intended to try the act a second time; and (c) if that State had been the main victim of the crime. The draft article provided, however, that in the case of a subsequent conviction, the second court, in passing sentence, should deduct any penalty imposed and served as a result of a previous conviction for the same act.

69. In his twelfth report, the Special Rapporteur observed that Governments had entered many reservations to this draft article; he attributed them to the fact that the draft article represented a compromise between two conflicting schools of thought, one favourable and the other opposed to the incorporation of the principle in the draft Code.

70. In the opinion of the Special Rapporteur, the non bis in idem principle was applicable on the assumption that an international tribunal existed which had concurrent jurisdiction with national jurisdictions, since it would destroy the authority of the international court if national courts had jurisdiction over cases already tried under that international jurisdiction. On the other hand, if no international criminal tribunal existed, the Special Rapporteur would find it much more difficult for the non bis in idem principle to be applied to decisions already handed down by a national court. He had therefore proposed, in his revised draft article 9, that the application of the non bis in idem principle should be confined to the situation in which an international criminal tribunal existed. 10/ He had modelled the wording

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10/ The revised draft article 9 proposed by the Special Rapporteur reads as follows:

"Article 9. Non bis in idem

1. No person shall be tried before a national court for acts constituting crimes against the peace and security of mankind for which he or she has already been tried by an international tribunal.

2. A person who has been tried by a national court for acts constituting crimes against the peace and security of mankind may be subsequently tried by the International Tribunal only if:

(a) the act for which he or she was tried was characterized as an ordinary crime and not as a crime against the peace and security of mankind;

(b) the national court proceedings were not impartial or

of his new draft article on article 10 of the Statute of the International Tribunal for trying crimes committed in the territory of former Yugoslavia.

71. Some members of the Commission directed their comments towards the draft article 9 adopted on first reading. They expressed doubts on the compatibility of that draft article, and particularly paragraphs 3 and 4, with article 14 of the International Covenant on Civil and Political Rights and with the corresponding provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

72. Referring to the new formulation of article 9 proposed by the Special Rapporteur, several speakers welcomed the fact that he excluded the possibility of States having a case tried by their own courts where it had already been tried by an international court. It was pointed out in this connection that, on the basis of a close study, it had been concluded that, under existing positive law, the non bis in idem principle applied only within a given legal system and that there were certain limits to the prohibition imposed by that principle, so that proceedings taken in another State, on the same facts, were not precluded. In that connection, it was remarked that the principle was relative when it authorized a retrial in cases where the higher interests of justice so required, where new facts favourable to the convicted person came to light and where the court which had tried the case had failed to show impartiality or independence. Those members therefore approved the approach taken by the Special Rapporteur in limiting the application of the principle solely to the circumstances in which an international criminal court existed, and they found the new formulation based on article 10 of the Statute of the International Tribunal for the former Yugoslavia acceptable.

73. Some members nevertheless expressed reservations concerning the inclusion in the draft Code of provisions analogous to those appearing in the Statute of the

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independent, were designed to shield the accused from international criminal responsibility, or the case was not vigorously prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served."

Tribunal for the former Yugoslavia. The Tribunal, they said, had been set up by a resolution of the Security Council which provided for measures that were binding on all United Nations Member States to maintain peace and security in the region, whereas the draft Code and draft statute for an international criminal court were addressed only to States that would become parties to them on a voluntary basis. Those members therefore considered that it would be difficult to apply the non bis in idem principle at the international level, since States were generally reluctant to accept the jurisdiction of an international court except in cases where, in view of the seriousness of the crimes committed, exclusive jurisdiction should be conferred on an international court.

74. Some members thought that the new text proposed by the Special Rapporteur failed to resolve the complex problems created by the non bis in idem principle, since the reference to ordinary crimes and fake trials in paragraph 2 posed serious questions.

75. With regard to draft article 10, on non-retroactivity, the Special Rapporteur observed in his twelfth report that the text had given rise to virtually no objections. Paragraph 1, he pointed out, reaffirmed a basic principle of criminal law, while paragraph 2 merely reproduced article 11 of the Universal Declaration of Human Rights and article 15, paragraph 2, of the International Covenant on Civil and Political Rights. He therefore proposed that the article should be retained. 11/

76. Several members expressed their agreement with the existing wording of the article, which they supported on the basis of the considerations set forth by the Special Rapporteur in his twelfth report. It was pointed out that the law could

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11/ Draft article 10 adopted provisionally on first reading and retained by the Special Rapporteur in his twelfth report reads as follows:

"Article 10. Non-retroactivity

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law."

have no retroactive effect except when it benefited the accused person.

77. Some members expressed reservations about the existing wording of paragraph 2 of the draft article. The reference to other treaties or domestic law and the words "in conformity with international law" contained in the paragraph attracted criticism. Other members did not share that criticism, however. They pointed out in this connection that, whereas the relevant provision in the International Covenant on Civil and Political Rights referred to "general principles of law recognized by the community of nations", draft article 10, paragraph 2, referred to "international law or domestic law applicable in conformity with international law". In the opinion of those members, a conscious decision had been taken to express, by means of this provision, the conviction that the world had entered an era of written law and hence there was no need to rely on unwritten principles. Moreover, the phrase employed in article 10, paragraph 2, had been used in order to underline the importance of the principle of the rule of law; it should therefore be retained.

78. In connection with draft article 11, "Order of a Government or a superior", the Special Rapporteur observed in his twelfth report that the principle embodied in this draft provision had already been affirmed in the "Principles of international law recognized in the Charter and Judgment of the Nürnberg Tribunal" (principle IV). The Commission, he said, had merely replaced the expression "provided a moral choice was in fact possible to him" by the expression "if, in the circumstances at the time, it was possible for him not to comply with that order". In the opinion of the Special Rapporteur, that principle should not be called into question without good reason and he therefore proposed that the draft article should be retained. 12/

12/ Draft article 11 adopted provisionally by the Commission on first reading and retained by the Special Rapporteur in his twelfth report reads as follows:

"Article 11. Order of a Government or a superior

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order."

79. Some members expressed reservations about the draft article and made suggestions for improving its wording. For example, it was remarked that, as currently formulated, the article was likely to pose serious problems because there was no connection between the order from a Government or from a superior and the question of guilt. To suggest otherwise would be to ignore established law and practice. It was suggested that the part of the sentence following the words "criminal responsibility" should be deleted. It was also remarked that the General Assembly had not actually "adopted" the Nürnberg principles but had only taken note of them. Another suggestion was to qualify the wording "possible" in the draft article, perhaps by the word "really" or the word "morally".

80. In the opinion of other members, the Commission should revert to the clause contained in Nürnberg principle IV and word the article as follows: "The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of moral responsibility under international law, provided a moral choice was in fact possible to him".

81. In regard to draft article 12, "Responsibility of the superior", the Special Rapporteur observed in his twelfth report that the provision established a presumption of responsibility on the part of the superior for crimes committed by his subordinates. That presumption of responsibility derived from the jurisprudence of the international military tribunals established after the Second World War to deal with crimes committed during the war, to which the Special Rapporteur had referred at some length in his fourth report. The jurisprudence was based on a presumption of responsibility on the part of the superior owing to negligence, failure to supervise or tacit consent, all of which were faults that made the superior criminally responsible for crimes committed by his subordinates. He proposed that the draft article should be retained. 13/

13/ Draft article 12 adopted provisionally by the Commission on first reading and maintained by the Special Rapporteur in his twelfth report reads as follows:

"Article 12. Responsibility of the superior

The fact that a crime against the peace and security of mankind was

82. Some members considered that the draft article was sound and that it should be retained as it stood.

83. Other members, while expressing the view that the general idea reflected in the draft article was acceptable, believed that its existing wording raised a number of problems. They observed that the phrase "if they knew or had information" introduced a notion which was correct but was, perhaps, stated rather too simplistically. Those members thought that the specific criteria according to which a superior could be regarded as responsible for an act should be spelled out, since the article as it stood imposed a very heavy responsibility on the superior. They also observed that the concept of presumption of responsibility referred to by the Special Rapporteur in his twelfth report warranted further consideration, bearing in mind the rule stated in article 8 concerning the presumption of innocence. In addition, it was suggested that the Commission should consider the sources of the draft article.

84. With regard to draft article 13, 14/ "Official position and responsibility", the Special Rapporteur, in his twelfth report, stated that although it was difficult to provide in detail for the various cases in which heads of State or Government should be prosecuted, what could be said was that whenever a head of State or Government committed a crime against the peace and security of mankind, he should be prosecuted. The Special Rapporteur proposed that draft article 13 should be retained as it stood.

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committed by a subordinate does not relieve his superiors of criminal responsibility if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime."

14/ Draft article 13 adopted on first reading by the Commission and retained by the Special Rapporteur reads as follows:

"Article 13. Official position and responsibility

The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility."

85. The proposal to retain draft article 13 unchanged was generally welcomed in the Commission. It was remarked in this connection that the draft article was based directly on principle III of the principles of international law recognized in the Charter of the Nürnberg Tribunal.

86. Furthermore, it was observed that the draft article entirely excluded immunity arising out of the official status of the person who committed a crime against the peace and security of mankind and that some thought should perhaps be given to the question of the immunity which the leaders of a State might enjoy with regard to judicial proceedings.

87. In regard to draft article 14, "Defences and extenuating circumstances", the provision adopted on first reading consisted of two paragraphs. The first provided that the competent court should determine the admissibility of defences under the general principles of law in the light of the character of each crime. The second paragraph provided that, in passing sentence, the court should, where appropriate, take account of extenuating circumstances.

88. The Special Rapporteur, in his twelfth report, expressed agreement with those Governments which, in their written responses, had considered that the concept of defences and that of extenuating circumstances should be dealt with separately. The two concepts, the Special Rapporteur said, were not in the same category. While defences stripped an act of its criminal character, extenuating circumstances did not remove that criminal character, but merely reduced the offender's criminal responsibility. In other words, defences related to the existence or non-existence of a crime, extenuating circumstances related to the penalty. The Special Rapporteur also shared the view that defences, because they sought to prove that no crime existed, should be defined in the Code, in the same way that crimes were defined in the Code according to the nullum crimen sine lege principle. He therefore proposed a new article 14 to deal with the issue of defences, namely, self-defence, coercion and state of necessity. 15/

15/ The new draft article 14 proposed by the Special Rapporteur reads as follows:

"Article 14 Self-defence, coercion and state of necessity

There is no crime when the acts committed were motivated by

89. The Special Rapporteur explained that the self-defence referred to here was not related to the international responsibility of the State provided for in Article 51 of the Charter of the United Nations. Article 51 exempted the State from international responsibility for an act committed by that State in response to an aggression. However, because self-defence constituted an exception to the international responsibility of the State, it also relieved the leaders of that State of international criminal responsibility for the act concerned. As for the concepts of coercion and state of necessity, the judicial precedents of the International Military Tribunals established by the Charter of the Nürnberg Tribunal of 8 August 1945 and by law No. 10 of the Control Council for Germany had admitted those concepts with the following reservations and conditions: (a) coercion and state of necessity must constitute a present or imminent danger; (b) an accused person who invokes coercion or state of necessity must not have helped, by his own behaviour, to bring about coercion or the state of necessity; and (c) there should be no disproportion between what was preserved and what was sacrificed in order to avert the danger. The Special Rapporteur also observed that this judicial practice, which had its origins in Anglo-American law, made no distinction between coercion and state of necessity.

90. The idea of dealing with defences in a separate article was generally welcomed in the Commission.

91. Criticism was nevertheless directed towards the wording of the new draft article 14 proposed by the Special Rapporteur. It was said that the new text was an oversimplification of the previous text and was likely to give rise to a regrettable confusion between self-defence in the case of an individual and that provided for in Article 51 of the Charter. Possible confusion between those two types of self-defence might well lead to serious consequences and made it necessary to clarify the text. It was also remarked that none of the defences mentioned in the draft article could justify an act such as genocide and that the starkness of the text might suggest that such crimes were justifiable. It was suggested that the ambiguity of the article might be lessened somewhat by embodying in the article the conditions for invokability mentioned by the Special Rapporteur in the body of his report (see para. 89 above). The Commission

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self-defence, coercion or state of necessity."

should, it was said, formulate a more specific text on self-defence, coercion and necessity, otherwise the defences would not be of much practical value to the accused.

92. It was further remarked that the draft article proposed by the Special Rapporteur should be split into two, as two different concepts were involved. An act done under self-defence was not illegal, whereas, in the case of coercion and state of necessity, fault was removed but not wrongfulness. Also, it was suggested that the defence of mistake should have a place in the draft, even though it was unlikely to be invoked frequently in a Code of Crimes against the Peace and Security of Mankind. "Insanity" and "consent" were also mentioned as defences which the Commission might consider in order to decide whether it would be advisable to include them in the draft Code.

93. In addition, some members expressed a certain reluctance to accept the idea that defences should exist for crimes as serious as crimes against the peace and security of mankind.

94. With regard to the new draft article 15, 16/ "Extenuating circumstances", which the Special Rapporteur had proposed in his twelfth report, he said it was generally admitted in criminal law that any court hearing a criminal case was entitled to examine the circumstances in which an offence had been committed and to determine whether there were any circumstances that diminished the responsibility of the accused. Furthermore, the Special Rapporteur did not believe it appropriate to discuss aggravating circumstances, since the crimes considered here were deemed to be the most serious of the most serious crimes. He said, however, that the question was one for the Commission to decide.

95. Several members expressed approval for including a special provision on extenuating circumstances in the Code. It was pointed out in this connection that, in English, the word "mitigating" would be preferable to the word "extenuating".

16/ The new draft article 15 proposed by the Special Rapporteur in his twelfth report reads as follows:

"Article 15. Extenuating circumstances

When passing applicable sentences, extenuating circumstances may be taken into account by the court hearing the case."

96. On the question of "insanity", which had been cited by some Governments as an extenuating circumstance, it was remarked that such a defence threatened to make the Code meaningless, since the perpetrators of such horrible crimes could all be considered insane.

97. It was also suggested that draft article 15 should be harmonized with the corresponding provision of the draft statute for an international criminal court and that it should be considered in conjunction with the question of penalties.

98. The remark was made that, in the event of the Code being applied by national jurisdictions, one easy solution would be to rely on the national legislations concerned in order to ascertain what the extenuating circumstances were.

99. In this connection, some members were of the opinion that, since extenuating circumstances were a matter for the sentencing judge, draft article 15 had no purpose.

100. Other members, however, thought that draft article 15 should deal with aggravating circumstances as well as extenuating circumstances.

101. At the conclusion of the discussion of his twelfth report, the Special Rapporteur summarized the main ideas that had emerged during the debate and gave his opinion on some of the points raised.

102. As far as the title of the draft Code was concerned, the Special Rapporteur believed that the subject continued to be topical, judging by recent events in former Yugoslavia, Rwanda and other countries, where crimes against humanity and war crimes were still being committed. He did not see how the title could be changed. A "Code of International Crimes" would be too broad, because the draft Code was restricted to the most serious crimes that constituted a danger for mankind and universal civilization.

103. With regard to article 1 (Definition), he had explained in a number of previous reports why the Commission had adopted a definition of crimes by enumeration rather than a general definition. Nevertheless, some members of the Commission still favoured a general, or conceptual, definition. He had no objection to that, but for the past 13 years not one general definition had been proposed, and he himself could not suggest one. An enumeration was a valid definition too. One Government had suggested a general definition followed by an indicative, and not limitative, enumeration. He liked that idea and had espoused

it, but he was also open to other proposals.

104. In regard to article 2 (Characterization), the Special Rapporteur said that it confirmed the independence of international law as opposed to internal law. While there was general agreement on the first sentence, the second sentence ("The fact that an act or omission is or is not punishable under internal law does not affect this characterization") had met with opposition, some members of the Commission contending that it was redundant and did not add anything new. The Special Rapporteur did not object to it being deleted, but it did explain and underpin the first sentence and he was therefore in favour of keeping it. He said that once it was admitted that international criminal law was a separate science, it must be possible to characterize the acts punished under that law. Characterization was usually a matter for the court. When someone accused another of a particular act, he did not have to characterize the act, but simply to describe the facts he was alleging. The court must characterize the act and decide which crime under the Code corresponded to that act. That was sometimes very difficult.

105. With regard to article 3 (Responsibility and punishment), the Special Rapporteur said it was not enough to find that a crime had been committed: the link between the act and the perpetrator's responsibility must also be established. A number of members had contested the use of the word "châtiment" in the French version and proposals had been made to replace it by "punition" or "sanction", which in his view were more or less synonymous. He would abide by the Drafting Committee's decision.

106. The concept of "attempt" in paragraph 3 had been discussed at some length. He had been asked which crimes under the Code could be the object of an attempt and which could not, but unfortunately he could not draw such a distinction in advance. In his opinion, engaging in such an exercise was pointless, as it was a matter for the courts to decide.

107. Article 4, on motives, was difficult and the Special Rapporteur did not see why the draft Code should devote a separate article to the subject. Motives varied greatly. Crimes could be committed for money, but also out of pride and even for more noble sentiments, such as honour or love. The members of the Commission had thought that the subject might be treated under article 14, on

defences and extenuating circumstances, and he had therefore asked for article 4 to be deleted, especially as it was confusing, complicated and superfluous in its present form.

108. It had been argued that article 5 (Responsibility of States) was incomplete, and he acknowledged that it was limited to crimes committed by representatives of a State. When a State official committed a wrongful act, the State was usually held responsible for that act. Some members of the Commission believed that the State could not always be held responsible, because certain individuals committed acts independently of the State. Although that was true, he had in mind State officials who were connected with the State in one form or another. Individuals could sometimes commit very serious international crimes without having any apparent link to a State. For example, some terrorist groups might have no visible link to a State. But even leaving that case aside, the State might still have special obligations: terrorists did not act in a vacuum. It was difficult to conceive how terrorist groups present in one State could commit serious crimes in another State without the first State being involved. If a State had a sound security system, it could not ignore the presence in its territory of terrorist groups that were fomenting crimes in the territory of another State. Article 7 of the Draft Declaration on Rights and Duties of States, adopted by the Commission in 1949, provided that every State had the duty to ensure that conditions prevailing in its territory did not menace international peace and order. Whenever a crime was committed against the peace and security of mankind, there was a State behind it, either through negligence or complicity. In any event, the Special Rapporteur opted for retaining article 5 as it stood, because it was confined to the responsibility of States for the acts of its officials.

109. The Special Rapporteur added that the question of criminal State responsibility had been constantly raised, even where it was inappropriate. Article 5 covered State responsibility resulting from acts committed by its officials. Some members had interpreted that article to mean that States must be held criminally responsible. He was not a partisan of criminal State responsibility, for reasons that he had evoked on a number of occasions. Moreover, neither article 19 of Part One of the draft on State responsibility nor the commentary thereto referred to criminal State responsibility. The Special

Rapporteur did not see how a State could incur criminal responsibility. Sanctions against a State were another matter, because they were political in nature and were taken by political bodies, for example the embargoes imposed by the Security Council or the political sanctions imposed by a victor State on a vanquished State. In short, State responsibility as understood under article 5 was international, but not criminal.

110. The Special Rapporteur said that in essence the obligation to try or extradite, set out in article 6, was based on the principle of universal jurisdiction, one which the Commission could not leave aside, especially as, not having originally received any mandate to prepare a draft statute for an international criminal court, that mandate had been given it much later. When an exceptionally serious crime was committed and violated the fundamental interests of mankind, all States were concerned. The purpose of paragraph 2 of article 6 was to provide for cases in which several States wanted to try a case. Paragraph 3 provided none the less for the subsequent establishment of an international criminal court, which would retain jurisdiction in the event of the competing jurisdiction of a State. No order of priority had been established in regard to extradition, but the Drafting Committee had given special consideration to the State in whose territory the crime had been committed, leaving open the possibility that an international criminal court might one day be established.

111. As to article 7, there had been a difference of opinion on the non-applicability of statutory limitations. Some members thought that absolute non-applicability was too strict and might prevent national reconciliation and amnesty. Others argued that, given the seriousness of the crimes under consideration, statutory limitations should not apply. In his opinion, the Commission should not take a position until the drafting of the Code was completed. He had already explained in earlier reports why he was in favour of keeping the number of crimes dealt with in the Code to a strict minimum. Once the actual crimes were determined, the Commission could then decide whether or not statutory limitations applied. For example, the Code currently included threat of aggression and crimes related to the environment. Serious as they might be, it was difficult to see why there should be no statutory limitation for them.

112. The Special Rapporteur said that, in regard to article 8, the general consensus in the Commission had been that the accused should enjoy judicial guarantees. It had been suggested that, in addition to the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, the draft should also make reference to regional conventions. Personally, the Special Rapporteur disagreed. In the drafting of an international instrument, documents that were universal in scope, not regional texts, should be taken as the basis.

113. The Special Rapporteur said that article 9 involved the transposition of the non bis in idem rule, which was essentially a rule of internal law, to international law. At the internal level there was no problem, as the national courts had to abide by the rule laid down by their internal legislation. In the case of international law, however, difficulties arose because of the lack of any supranational authority which could impose its decisions on States. The rule had therefore been introduced into international law gradually, first at the regional level by means of treaties or agreements between several States which provided that a decision handed down in one State would have legal effect in another State, and then at the universal level, through the International Covenant on Civil and Political Rights. The draft Code could not now ignore the important issues raised by the rule. In the Drafting Committee two opposing schools of thought had emerged. Some members, who considered that the rule was so important that it amounted to a subjective right of the individual, were strongly in favour of it being included in the Code. Others were opposed to it, for practical reasons: an individual could, such members argued, circumvent the rule by taking refuge in a neighbouring State with which he had political affinities and whose courts were more likely to be indulgent. The non bis in idem rule would ensure that he was not tried in another State where the courts might be more severe. The Special Rapporteur stated that, in the light of the two differing views, it had been necessary to find a compromise, and that compromise was reflected in article 9, which first set forth the basic rule and then provided for the two exceptions in paragraphs 4 (a) and 4 (b). There was, however, a third exception which could arise because of a possible mistake in characterization, as, for example, where a person was tried for murder but it subsequently transpired that

his real motive had been genocide. With regard to the word "impartial" in paragraph 2 (b) of the revised draft article 9, which also appeared in the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia, the Special Rapporteur agreed that in the context that word was not correct inasmuch as one State could not judge the impartiality of another, at least in theory.

114. The Special Rapporteur said that article 10, on non-retroactivity, had generally been found acceptable.

115. With regard to article 11, the Special Rapporteur said that it differed only slightly from the provision in the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal, on which it was based. There was just one problem with the article: while a person could not generally invoke the order of a Government or a superior so as to escape criminal responsibility, everything depended on the nature of the order. Some orders were so manifestly illegal that any person who obeyed them would be criminally responsible. That was not always the case, however. It would be very difficult for a private in the army, for instance, to know whether an order he had received was in conformity with the norms of international humanitarian law. The matter could none the less be taken care of in the commentary.

116. The Special Rapporteur recognized that his proposed new article 14, which dealt with self-defence, coercion and state of necessity, was extremely brief. It would perhaps have been better to deal, on the one hand, with self-defence, which was indeed a defence, and on the other, with coercion and state of necessity, which were not defences but elements that mitigated the responsibility of the person who committed the crime, without, however, removing the criminal nature of the act itself. It was widely acknowledged, and it was also clear from Part One of the draft on State responsibility, that self-defence precluded wrongfulness. The Special Rapporteur had simply intended to say that, if a State charged with committing an act of aggression invoked self-defence, and that plea was accepted, the wrongfulness of the act would be precluded. Consequently, the leaders of the State who had ordered the act could not be tried for aggression. He had not sought to suggest that it was possible to respond to aggression by

genocide.

117. The Special Rapporteur said that coercion, on the other hand, did not preclude wrongfulness, but it could be taken into consideration in setting aside criminal responsibility. A state of necessity was to be distinguished from coercion in that it involved an element of choice. The wealth of judicial practice cited in the Special Rapporteur's fourth report also showed that coercion and state of necessity could be taken into consideration in setting aside or mitigating responsibility, and it therefore supported the inclusion of a reference to such circumstances in the draft Code.

118. In regard to extenuating circumstances, which formed the subject of a new article 15, the Special Rapporteur said there was no obligation to include a provision on that subject in the draft Code, but it was generally recognized that the courts were entitled to examine any circumstances - personal, family or other - that diminished the responsibility of the accused. As stated in his twelfth report, he did not believe it appropriate to discuss aggravating circumstances, since the crimes covered in the Code were the most serious of the most serious crimes, and it was difficult to envisage circumstances that would aggravate responsibility still further. If the Commission none the less considered that such a provision should be incorporated in the Code, the Drafting Committee would no doubt be willing to attend to the matter.

119. With regard to the settlement of disputes, the Special Rapporteur was perfectly prepared to submit an article on the subject.

120. At the conclusion of the discussion, the Commission decided that the work on the draft Code and on the draft statute should be coordinated by the Special Rapporteur on the draft Code and by the Chairman and members of the Drafting Committee and the Working Group and that the draft articles should be referred to the Drafting Committee.

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